

## **CHAPTER 1.**

### **Introduction**

The federal government requires state and local governments to operate the Federal Disadvantaged Business Enterprise (DBE) Program if they receive U.S. Department of Transportation (USDOT) funds for transportation projects. The Arizona Department of Transportation (ADOT) has been operating some version of the Federal DBE Program since the 1980s.

Every three years, ADOT must set an overall annual goal for participation of DBEs in those contracts. The goal is expressed as the percentage of contract dollars that will go to firms certified as DBEs. ADOT has had an overall DBE goal of 7.76 percent for contracts funded by the Federal Highway Administration (FHWA). This overall DBE goal was for the three federal fiscal years ending September 30, 2014. In recent time periods, ADOT has met this goal or has been close to meeting it.

ADOT must submit a new overall DBE goal for FHWA-funded contracts for the next three federal fiscal years (FFY 2015, FFY 2016 and FFY 2017) and submit it to FHWA before October 1, 2014.

The USDOT recommends that agencies such as ADOT conduct disparity studies to develop the information needed to effectively implement the Program, including setting overall DBE goals. ADOT last conducted a disparity study in 2009.

ADOT retained Keen Independent Research LLC (Keen Independent) to conduct the 2015 Disparity Study. The 2014 Availability Study is the first component to be completed. Keen Independent released the Availability Study at this time so that ADOT could use study results when developing its new overall DBE goal for FHWA-funded contracts.

The 2015 Disparity Study, to be completed in summer 2015, will contain more information about the utilization and availability of minority- and women-owned firms for ADOT contracts. If warranted, ADOT can use those complete study results to refine its three-year overall DBE goal for FHWA-funded contracts. ADOT can also use information from the 2015 Disparity Study to set its future overall DBE goals for contracts funded by the Federal Transit Authority (FTA) and Federal Aviation Administration (FAA).

The website [www.adotdbestudy.com](http://www.adotdbestudy.com) provides regularly-updated information about the 2015 Disparity Study through its completion.

Chapter 1 of the Availability Study:

- A. Introduces the study team;
- B. Provides background on the Federal DBE Program;
- C. Outlines the analyses and describes where results appear in the report; and
- D. Describes the public comment process for the draft Availability Study report.

## A. Study Team

David Keen, Principal of Keen Independent, directed this study. He has conducted similar studies for more than 70 public agencies throughout the country, including a number of state transportation departments. Keith Wiener from Holland & Knight provided the legal framework for this study. Mr. Wiener has extensive experience with disparity studies as well. Mr. Keen and Mr. Wiener have helped public agencies successfully defend DBE and minority business enterprise programs in court.

The Keen Independent study team includes the seven companies listed below. Five of the team members are minority- and/or women-owned firms.

Figure 1-1.  
2015 Disparity Study team

Firm	Location	Team Leader	Responsibilities
Keen Independent Research LLC, prime consultant	Wickenburg, AZ Denver, CO Madison, WI	David Keen Principal	All study phases
Holland & Knight LLP (H&K)	Atlanta, GA	Keith Wiener Partner	Legal framework
Customer Research International (CRI)	San Marcos, TX	Sanjay Vrudhula President	Availability telephone interviews
Así Marketing Group	Phoenix, AZ	Letty Alvarez Principal	In-depth interviews, public outreach
Don Logan & Associates	Chandler, AZ	Don Logan Principal	In-depth interviews
The Genesis Consulting Group	Phoenix, AZ	Mary Ortega-Itsell President	In-depth interviews for aviation
Gordley Group	Tucson, AZ	Jan Gordley President	In-depth interviews, public outreach

## B. Federal DBE Program

ADOT has been operating some version of a Federal DBE Program since the 1980s. After enactment of the Transportation Equity Act for the 21<sup>st</sup> Century (TEA-21) in 1998, USDOT established a new Federal DBE Program to be operated by state and local agencies receiving USDOT funds. USDOT revised the Federal DBE Program in 2011.

Federal regulations in 49 CFR Part 26 state how state and local governments must operate the Federal DBE Program.<sup>1</sup> If necessary, under the federal regulations, the Program allows state and local agencies to use DBE contract goals, which ADOT sets on certain FHWA-funded contracts. When awarding those contracts, ADOT considers whether or not a bidder or proposer meets the DBE goal set for the contract or shows good faith efforts to do so.

The Federal DBE Program also applies to cities, towns, counties, transportation authorities, tribal governments and other jurisdictions that receive USDOT funds through agencies such as ADOT.

**Key Program elements.** Components of the Federal DBE Program include the following elements.

**Setting an overall goal for DBE participation.** ADOT must develop an overall three-year goal for DBE participation in its USDOT-funded contracts. The Federal DBE Program sets forth the steps an agency must follow in establishing its goal, including development of a “base figure” and consideration of possible “step 2” adjustments to the goal.<sup>2</sup>

ADOT’s overall goal for DBE participation is aspirational — ADOT does not need to meet the goal and failure to do so does not automatically cause any USDOT penalties. However, if ADOT does not meet its overall DBE goal, federal regulations require it to analyze the reasons for any shortfall and develop a corrective action plan to meet the goal in the next fiscal year.<sup>3</sup> ADOT’s goal for the three-year period beginning October 2011 is 7.76 percent DBE participation.

The 2014 Availability Study provides ADOT information to help it set its overall DBE goal for FHWA-funded contracts for the next three federal fiscal years beginning October 2014 (federal fiscal years 2015, 2016 and 2017).

The 2015 Disparity Study will include additional results for ADOT review. The Disparity Study will also provide information for ADOT as it sets overall three-year DBE goals for FTA- and FAA-funded contracts, which have submission deadlines after publication of the Disparity Study.

**Establishing the portion of the overall DBE goal to be met through neutral means.** Regulations governing operation of the Federal DBE Program allow for state and local governments to operate the program without the use or with limited use of race- or gender-based measures such as DBE contract goals. According to program regulations 49 CFR Section 26.51, a state or local agency must meet the maximum feasible portion of its overall goal for DBE participation through “race-neutral means.” Race-neutral program measures include removing barriers to participation of firms in general or promoting use of small or emerging businesses (see 49 CFR Section 26.51(b) for more

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<sup>1</sup> 49 CFR Part 26 [http://www.ecfr.gov/cgi-bin/text-idx?tpl=/ecfrbrowse/Title49/49cfr26\\_main\\_02.tpl](http://www.ecfr.gov/cgi-bin/text-idx?tpl=/ecfrbrowse/Title49/49cfr26_main_02.tpl).

<sup>2</sup> 49 CFR Section 26.45.

<sup>3</sup> 49 CFR Section 26.47.

examples of race-neutral program measures). If an agency can meet its goal solely through race-neutral means, it must not use race-conscious program elements. For example, a state DOT operating a 100 percent race- and gender-neutral program would not apply DBE contract goals.

The Federal DBE Program requires that an agency project the portion of its overall DBE goal that it will meet through neutral measures and the portion, if any, to be met through race-conscious measures such as DBE contract goals. USDOT has outlined a number of factors for an agency to consider when making that determination.<sup>4</sup>

Many state DOTs project that they will meet their overall DBE goal through a combination of race-neutral and race-conscious measures. Some DOTs have operated the Federal DBE Program solely through neutral measures and without the use of DBE contract goals (state DOTs in Florida, Idaho, Maine, New Hampshire and Vermont are examples). These agencies projected that 100 percent of their overall DBE goal will be met through neutral means.

ADOT's projection related to FHWA-funded contracts for the past three fiscal years was that it would meet 2.68 percentage points of its overall three-year DBE goal through race-neutral means and the balance (5.08 percentage points) through race-conscious measures.

The 2014 Availability Study provides information to help ADOT project the portion of its overall DBE goal to be met through race-neutral means. The 2015 Disparity Study will provide additional results for ADOT review.

**Determining whether all racial/ethnic/gender groups will be eligible for race or gender-conscious elements of the Federal DBE Program.** Under the Federal DBE Program, the following race/ethnic/gender groups can be presumed to be socially disadvantaged:

- Black Americans (or “African Americans” in this study);
- Hispanic Americans;
- Native Americans;
- Asian-Pacific Americans;
- Subcontinent Asian Americans; and
- Women of any race or ethnicity.

To be economically disadvantaged, a company must be below revenue limits and its firm owner(s) must be below net worth limits.<sup>5</sup> White male-owned firms and other ethnicities not listed above can also meet the federal certification requirements and be certified as DBEs if they demonstrate that they are both socially and economically disadvantaged, as described in 49 CFR Part 26.67 (d). (This has occurred in Arizona.)

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<sup>4</sup> See Chapter 7 of this report for an in-depth discussion of these factors.

<sup>5</sup> 49 CFR 26 Subpart D provides certification requirements. There is a gross receipts limit (currently not more than \$22,410,000 annual three-year average revenue, and lower limits for certain lines of business) and a personal net worth limit (currently \$1.32 million excluding equity in the business and primary personal residence) that firms and firm owners must fall below to be able to be certified as a DBE. <http://www.ecfr.gov/cgi-bin/text-idx?SID=5423bdfc26c2255aef5fb43e3f450a13&node=49:1.0.1.1.20.4&rgn=div6>.

ADOT's current operation of the Program, similar to most states, includes DBEs owned by each of the above minority groups and women as eligible for race- and gender-conscious measures including meeting DBE contract goals. However, USDOT provides a waiver provision if an agency determines that it does not need to include certain racial, ethnic or gender groups in the race- or gender-conscious portions of the Federal DBE Program. Some state DOTs have set contract goals for "Underutilized DBEs" (UDBEs), which does not include all DBE groups. These states count the participation of all DBEs toward their overall DBE goals, but only UDBEs can be used to meet individual contract goals. Each state determined the DBE groups that were UDBEs in part by examining results of disparity analyses for each racial, ethnic and gender group.

The 2015 Disparity Study will include information for ADOT as it considers whether all groups or only some of the groups listed above should be eligible for any race- and gender-conscious portions of the Program.

**Promoting DBE participation as prime contractors.** The Federal DBE Program calls for agencies to remove any barriers to DBE participation as prime contractors and consultants, but does not require agencies to operate programs that give preference to DBE primes. Quotas are prohibited, but under extreme circumstances, an agency can request USDOT approval to use preference programs related to prime contractors.

The Federal DBE Program requires agencies such as ADOT to develop programs to assist all small businesses.<sup>6</sup> For example, small business preference programs, including reserving contracts on which only small businesses can bid, are allowable under the Federal DBE Program.

**Promoting DBE participation as subcontractors.** In accordance with federal regulations and subject to USDOT approval, an agency can decide that it will use DBE contract goals as part of its operation of the Federal DBE Program. ADOT currently uses DBE contract goals for certain FHWA-funded contracts. (ADOT did not set DBE contract goals from January 2006 through fall 2010 as explained in Chapter 2.)

#### **Past court challenges to the Federal DBE Program and to state and local agency**

**implementation of the Program.** Although agencies are required to operate the Federal DBE Program in order to receive USDOT funds, different groups have challenged program operation in court.

- A number of courts have held the Federal DBE Program to be constitutional, as discussed in Chapter 2 and Appendix B of this report.
- State transportation departments in California, Illinois, Minnesota, Montana and Nebraska successfully defended their operation of the Federal DBE Program, as have several cities and other local government agencies. The Washington State Department of Transportation was not able to successfully defend its operation of the Federal DBE Program. (See Chapter 2 and Appendix B.)

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<sup>6</sup> 49 CFR Section 26.39.

In *Associated General Contractors of America, San Diego Chapter, Inc. v. California Department of Transportation*, the Ninth Circuit Court of Appeals examined the methodology and results of the disparity study David Keen directed for the California Department of Transportation (Caltrans). (Mr. Keen also provided expert testimony in this case.) As discussed in more detail in Appendix B, the Ninth Circuit favorably reviewed the methodology and the quantitative and qualitative information provided in the disparity study and determined that the information justified Caltrans' operation of the Federal DBE Program. Keen Independent is applying a methodology in the 2015 Disparity Study and the 2014 Availability Study that is very similar to what the court favorably reviewed in the Caltrans case.

As discussed in Chapter 2 of this Availability Study, ADOT also succeeded when facing a legal challenge to its implementation of the Federal DBE Program.

### **C. Analyses Performed in the Availability Study**

The ADOT 2014 Availability Study provides information to assist ADOT as it:

1. Establishes a new three-year goal for DBE participation in its FHWA-funded contracts; and
2. Estimates the portion of its overall DBE goal to be met through race- and gender-neutral means and any portion to be met through race- and gender-conscious means.

Keen Independent conducted the following analyses to prepare the Availability Study.

#### **Collection of prime contract and subcontract information for past FHWA-funded contracts.**

The study team collected information about past FHWA-funded contracts awarded by ADOT or by local agencies from July 2007 through June 2013. Chapter 3 of the 2014 Availability Study outlines the data collection process and describes these contract data.

These data were needed in the 2014 Availability Study to identify the relevant geographic market area and types of work involved in ADOT's FHWA-funded contracts. With this information, Keen Independent could then design the availability data collection and analysis, as described below. The information about individual prime contracts and subcontracts was also used in the Availability Study to develop dollar-weighted estimates of overall availability of current and potential DBEs.

The July 2007 through June 2013 contract information will also be used in the 2015 Disparity Study. The Disparity Study will examine utilization of minority- and women-owned firms on ADOT's past contracts and whether there were any disparities between past utilization and what might be expected from the availability analysis.

**Availability analysis.** Keen Independent's availability analysis generates a benchmark to use when assessing ADOT's utilization of minority- and women-owned firms. Those results will appear in the 2015 Disparity Study.

The availability results also provide information for ADOT to consider when setting its three-year goal for DBE participation on FHWA-funded contracts. The 2014 Availability Study focuses on the availability results for establishing this overall DBE goal. Discussion of results is organized as follows:

- Chapter 5 describes the methods used to collect and analyze availability of minority-, women- and majority-owned firms, and also presents information relevant to ADOT's "base figure" for its overall DBE goal.
- Chapter 6 outlines the base figure and potential step 2 adjustments for ADOT consideration.
- Chapter 7 provides information concerning ADOT's projection of the portion of the goal to be met through neutral measures. Appendix D provides further information about the availability interviews with Arizona businesses.

**Analysis of local marketplace conditions.** The study team also examined conditions within the Arizona marketplace. In accordance with USDOT guidance, Keen Independent analyzed:

- Any evidence of barriers for minorities and women to enter and advance in their careers in the construction and engineering industries in Arizona (Appendix E);
- Any differences in rates of business ownership in Arizona (discussed in Appendix F);
- Access to business credit, insurance and bonding (Appendix G);
- Any differences in measures of business success and access to prime contract and subcontract opportunities (Appendix H); and
- Certain other issues potentially affecting minorities and women in the local marketplace.

Chapter 4 of the Availability Study synthesizes information about local marketplace conditions, including comments from telephone interviews with business owners and managers, a review of complaints made with ADOT concerning DBE issues, and results of in-depth personal interviews with business owners and trade associations completed and analyzed as of the time of this report. Keen Independent will also review comments received during or after public meetings held in August 2014 and include an analyses of these comments in the final Availability Study report to be prepared in September 2014. This combined quantitative and qualitative information about the marketplace is relevant to ADOT's development of an overall DBE goal and its projection of how much of the goal will be met through neutral means.

The 2015 Disparity Study will include more complete information from in-depth interviews with business owners and trade associations. The study team will complete more than 60 such interviews by the time of the 2015 Disparity Study report.

**Presentation of results in the study.** Report chapters provide information to help ADOT make decisions concerning its operation of the Federal DBE Program.

Figure 1-2.  
Chapters in the Availability Study report

Chapter	Description
ES. Executive Summary	Brief summary of study results
1. Introduction	Study purpose, study team and overview of analyses
2. Legal Framework	Summary of Federal DBE Program regulations and relevant court decisions
3. ADOT Transportation Contracts	How the study team collected ADOT and local agency contract data and defined the geographic area and transportation contracting industry
4. Marketplace Conditions	Summary of quantitative and qualitative information about the Arizona transportation contracting marketplace
5. Availability Analysis	Methodology and results regarding availability of minority- and women-owned firms and other businesses for ADOT contracts and subcontracts
6. ADOT's Overall DBE Goal for FHWA-funded Contracts	Information for ADOT to review when setting a three-year overall DBE goal, including consideration of a "step 2 adjustment"
7. Portion of DBE Goal to be Met through Neutral Means	Information helpful when ADOT projects the percentage of overall DBE goal to be met through neutral means

In addition to the chapters described above, nine report appendices provide supporting information concerning 2014 Availability Study methodology and results.



#### **D. Public Comment Process for the Draft 2014 Availability Study Report**

ADOT distributed this Draft Availability Study report for public comment. Concurrently, ADOT asked for public comments about its proposed overall three-year goal for FHWA-funded contracts. The public comment period for the draft report and proposed overall DBE goal is open through September 17, 2014.

ADOT is holding four public hearings concerning the proposed DBE goal study and the Draft Availability Study:

- Tucson on August 18;
- Yuma on August 19;
- Flagstaff on August 25; and
- Phoenix on August 27.

Times and locations for these public hearings can be found at [www.adotDBEstudy.com](http://www.adotDBEstudy.com).

The public can give feedback at those meetings and/or provide written comments in person at the hearings or online or via email at [info@adotDBEstudy.com](mailto:info@adotDBEstudy.com).

Keen Independent will review feedback and comments before preparing the final 2014 Availability Study report in late September. The final Availability Study report will also summarize public comments. ADOT will also review comments before preparing the overall DBE goal it will submit to FHWA before October 1, 2014.